

CORRECTED COPY

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
LIND, KRAUSS, and PENLAND  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Specialist JAMIE<sup>1</sup> T. GOLD**  
**United States Army, Appellant**

ARMY 20120964

Headquarters, 101st Airborne Division (Air Assault) and Fort Campbell (convened)  
Headquarters, Fort Campbell (action)  
Timothy Grammel and Steven E. Walburn, Military Judges  
Lieutenant Colonel Jeff A. Bovarnick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA;  
Captain Sam Gabremariam, JA; Captain T. Campbell Warner, JA (on brief).

28 January 2015

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MEMORANDUM OPINION  
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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

LIND, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 920 (2006).<sup>2</sup> The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for three months, and reduction to the grade of E-1.

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<sup>1</sup> Corrected

<sup>2</sup> Appellant was acquitted of the greater charged offense of aggravated sexual assault by causing bodily harm in violation of Article 120, UCMJ.

This case is before the court for review under Article 66, UCMJ. Appellant raises a single assignment of error alleging a *Brady violation*, which merits discussion but no relief.

### FACTS

For several months in 2011, appellant and TR, who was married to a soldier in appellant's unit, engaged in a consensual relationship that involved sexual contact, but not sexual intercourse. On the evening of 12-13 November 2011, TR, appellant, and appellant's wife engaged in heavy drinking and became intoxicated. Appellant's wife vomited and appellant took her upstairs. Appellant returned downstairs, and TR and appellant then engaged in sexual activity that TR described as consensual at first, but became nonconsensual after she told appellant "to stop" and that she was "too drunk" to engage in any further sexual activity. TR testified that she fell asleep, and when she woke up, appellant was "on [her] . . . on [her] hips." When asked if she remembered him "penetrating [her] with his penis," she replied, "I don't remember feeling it, but I remember the impact." She described this "impact" as "the impact of sex . . . [t]he impact-- it was him--his body hitting me, his weight on me, moving me up towards the top of the couch."

Because appellant was charged with aggravated sexual assault, which requires a finding of "penetration, however slight" of the vulva by the penis,<sup>3</sup> the military judge, after closing the court to deliberate, *sua sponte* recalled TR to the stand. The following exchange occurred:

MJ: Was [appellant's] penis inside your vagina?

TR: I can't be a hundred percent sure. I was pretty--my whole body felt numb. The only reason I knew exactly what was going on was that he was on me and the impact felt that way. Do you understand?

MJ: Was his penis erect?

TR: Yes, and the only reason I know is because once he ejaculated on me, I did look down and I saw.

MJ: So, what do you mean by "the impact of sex?"

TR: The motion of his body hitting mine, forcing mine up towards the couch, on top of the couch.

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<sup>3</sup> *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 45.b.(3)(b)(i), 45.a.(t)(1)(A).

MJ: But you're telling the court that you are not sure if his penis was inside your vagina or not?

TR: Yes.

The military judge acquitted appellant of aggravated sexual assault and convicted him of the lesser-included offense of abusive sexual contact, which does not require a finding of penetration. *MCM*, pt. IV, ¶ 45.b.(8)(b)(i)(a)-(b).

Both of appellant's civilian defense counsel filed identical affidavits as enclosures to appellant's Rule for Courts-Martial [hereinafter R.C.M.] 1105 matters stating that during the "Bridging the Gap" session after trial:

The Military Judge explained that he reopened the Court-Martial from its deliberation on findings to recall . . . [TR] because he did not remember [TR] testifying that [appellant's] penis was ever inside her. [TR] told the Military Judge that she was not sure if [appellant's] penis was ever inside her. Upon hearing this, the Trial Counsel responded that [TR] had also told this to Government counsel while preparing for trial.

Both affidavits then alleged "[TR's] report to Government Counsel that she could not remember [appellant's] penis being inside her" was never disclosed to the defense and that the information would have "directly informed [defense counsel's] advice to [appellant] regarding whether to take the stand and what venue to select. The Defense's trial strategy would also have changed had this disclosure been made." <sup>4</sup>

Trial counsel filed an affidavit before this court agreeing that during the "bridging the gap" session, the military judge raised the issue of penetration. Her affidavit stated that: "The Government responded with a matter-of-fact statement that *both* parties already knew; that the victim didn't remember penetration, she remembered the 'impact of sex.'" Her affidavit further stated that TR testified the same way at the Article 32 investigation, attended by both civilian defense counsel, and that TR "never claimed . . . she remembered the moment [appellant] penetrated her vagina with his penis" in her sworn statement to CID, her Article 32 testimony, or anytime afterward.<sup>5</sup>

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<sup>4</sup> Appellant's R.C.M. 1105 matters describe in greater detail how the government's non-disclosure prejudiced appellant.

<sup>5</sup> The summarized transcript of the Article 32 investigation states that TR testified: "It felt like he put his penis in me from the impact."

Appellant argues that trial counsel failed to disclose the exculpatory statements made by TR to his defense team prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

## LAW AND DISCUSSION

To the extent that trial and defense counsel affidavits conflict, we must determine whether a post-trial evidentiary hearing is required. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F.1997). We conclude a hearing is not required in this case upon application of the first *Ginn* principle: “if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor, the claim may be rejected on that basis.” *Id.* at 248.

A *Brady* violation occurs when the government withholds evidence favorable to the defense that is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. *Cone v. Bell*, 556 U.S. 449, 451 (2009) (citing *Brady*, 373 U.S. at 87). Courts apply a three-part test to determine whether a *Brady* violation has occurred whereby an appellant must show that: (1) the evidence at issue was favorable to the accused, either because it is exculpatory or impeaching; (2) the prosecution suppressed the evidence either willfully or inadvertently; and (3) prejudice ensued because the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433-35 (1995). Evidence is material when there is “a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Cone*, 556 U.S. at 469-470; *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012). This means that “the likelihood of a different result is great enough to ‘undermine[ ] confidence in the outcome of the trial.’” *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (quoting *Kyles*, 514 U.S. at 434).

Assuming the facts alleged in civilian defense counsels’ affidavits are true (that TR told the government she did not remember penetration and trial counsel failed to disclose this statement to the defense team prior to trial), we hold, under the totality of the circumstances in this case, that the evidence was not material and consequently appellant suffered no prejudice for the three following reasons.<sup>6</sup>

First, consent, not whether sexual activity occurred, was the contested issue at trial. TR consistently maintained that sexual activity occurred with appellant (whether there was penetration or not) and that she did not consent. Appellant’s

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<sup>6</sup> For the same reasons, we find any alleged failure by the government to disclose favorable evidence in accordance with Article 46, UCMJ and R.C.M. 701(a)(6) to be harmless beyond a reasonable doubt. *See United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004).

statement to the Criminal Investigation Command (CID) agent was admitted into evidence by the government in its case in chief. In that statement appellant admitted that he had sexual intercourse with TR on the evening of 12-13 November 2011 and that he ejaculated. Appellant's statement corroborated TR's testimony that the sexual activity necessary to convict appellant of abusive sexual contact occurred. The military judge's finding of guilt only as to abusive sexual contact (no penetration required) moots any possible prejudice that may have resulted from a failure to disclose TR's statement that she could not remember penetration.

Second, any impeachment value of the undisclosed statement was minimal at best. Trial defense counsel cross-examined TR extensively as to her memory of the encounter. In addition, trial defense counsel cross-examined TR as to: (1) her motives for reporting a nonconsensual sexual encounter (with someone with whom she had previously engaged in consensual sexual contact); (2) her prior inconsistent statements made to CID; and (3) her general lack of credibility. Thus, TR's lack of memory as to penetration would have just been one more piece of cross-examination out of many already explored at trial. The absence of this one area of cross-examination does not create a reasonable probability that there would have been a different result at trial and does not undermine our confidence in the outcome of appellant's trial. *Strickler*, 527 U.S. at 289-96.

Third, assuming TR's statement that she could not remember penetration contradicted any earlier pretrial statements she made about the sexual activity, any failure by the government to disclose this statement to the defense prior to trial did not preclude appellant's defense counsel from exploring these inconsistent statements on cross-examination. TR testified on direct examination that she did not remember "feeling" penetration, only the "impact." TR's direct testimony provided appellant's defense counsel ample information to impeach her with her prior inconsistent statements notwithstanding the alleged non-disclosure. Counsel did not engage in this line of cross-examination, consistent with the focus of the defense theory of the case—that sexual intercourse occurred and TR consented to it.<sup>7</sup>

## CONCLUSION

After consideration of the entire record, including the pleadings submitted by the parties, the findings of guilty and the sentence are AFFIRMED.

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<sup>7</sup> To the extent appellant's R.C.M. 1105 matters suggest that defense counsel would have advised appellant not to testify had the government disclosed TR's statement regarding penetration, we note that TR testified as to the same statement during the government's case-in-chief well before appellant testified.

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Judge KRAUSS and Judge PENLAND concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over a light blue circular stamp.

MALCOLM H. SQUIRES, JR.  
Clerk of Court